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In The

Supreme Court of the United States

AHMED OMAR ABU ALI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This Reply Petition for a Writ of Certiorari is submitted in response to the government's Brief In Opposition to Ahmed Abu Ali's Petition for a Writ of Certiorari. In its opposition to the Petition, the government argues that (a) the error in this case is a common trial error not subject to harmless-error analysis, and (b) this Court has held that Confrontation Clause errors are subject to harmless-error analysis.

However, for the reasons set forth below, as well as for those set forth in the Petition for a Writ of Certiorari itself (hereinafter the "Petition"), each of the government's assertions is wrong. This Reply will not repeat the analysis set forth in the Petition with respect to the merits, but instead will focus on the fatal deficiencies in the government's response.

Accordingly, it is respectfully submitted that the Writ should be granted in this case.

ARGUMENT

A. The Fundamental Constitutional Error in This Case Affects the Entire Framework of the Trial and Warrants *Per Se* Reversal.

The government argues that the error in this case was an error in the "presentation of the case to the jury," and is therefore a simple trial error subject to harmless-error review. Government's Brief ("GB")

at 12, *citing Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). That assertion is incorrect.

The government urges this Court to find the error here subject to harmless-error analysis because "most constitutional errors can be harmless." GB at 11, *quoting Fulminante*, 499 U.S. at 306. However, that dicta does not change the rule set forth by this Court in *Chapman v. California*, 386 U.S. 18 (1967).

In *Chapman*, this Court stated, "[w]e conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Chapman*, 386 U.S. at 22. However, the *Chapman* Court continued, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.*, at 23. Nothing in *Fulminante*, 499 U.S. 279, changes that basic rule.

Indeed, as the government states, "[t]o justify automatic reversal without regard to prejudice, an error must be so fundamental an alteration of the 'framework within which the trial proceeds' that it 'def[ies] analysis by "harmless-error" standards.'" GB at 12, *quoting Fulminante*, 499 U.S. at 309, 310. More recently, this Court stated that "[i]t is true enough that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded

so long as the trial is, on the whole, fair." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). The error in this case is an error that fundamentally alters the framework of the trial procedure, and as such warrants automatic reversal.

The error in this case – admitting *ex parte* evidence against Mr. Abu Ali – strikes at the very core of our system of justice. This is no ordinary constitutional violation. The right at issue here – the defendant's right to see and confront the evidence against him – is the right that literally defines our accusatorial system of justice. A trial in which the prosecutor presents a dossier of evidence to the trier of facts, but affords the defendant no opportunity to challenge that evidence, is the hallmark of an inquisitorial system. While scholars may debate the relative merits of the two systems, the fact remains that our Constitution and the system of justice it created, is accusatorial. The bedrock right that separates the two systems is the right of the accused to directly confront the evidence against him.

Although the government acknowledges that the district court violated Mr. Abu Ali's Confrontation Clause rights, the government argues against a bright line rule preventing future violations of this kind by stating that "there is no reason to speculate that these unusual facts will recur." GB at 19. However, it is not the magnitude of the error on these particular facts that matters, but rather the fundamental nature of the error. The lower court's ruling allows district courts and prosecutors to pick and

choose which evidence the accused will be privy to view, leaving the determination of whether or not it was error to a case-by-case analysis. This slippery slope cannot be maintained. As this Court has warned:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

Boyd v. United States, 116 U.S. 616, 635 (1886).

The government contends there "is no reason to speculate that these unusual facts will recur," GB at 19, but that misses the point. It is the *fundamental constitutional principle*, and not the facts peculiar to a particular case, that require vindication here. Indeed, the surest way to prevent a recurrence of the Sixth Amendment violation that the government concedes occurred in this case, regardless of the particular facts at issue, is to establish a categorical rule that such an error will not be countenanced.

Accordingly, this Court should grant the Writ in order to correct the fundamental Sixth Amendment violation that occurred below.

B. This Case Presents an Issue of First Impression, as This Court Has Never Ruled Whether the Sixth Amendment Can Ever Tolerate a Trial in Which *Ex Parte* Evidence Is Admitted Against the Accused.

The government claims that "this Court has squarely held that Confrontation Clause errors are subject to harmless error analysis." GB at 13. Yet, in seeking to impose that general statement as a rule in *all* Sixth Amendment contexts, applicable to *all* Sixth Amendment violations, the government overreaches.

Like the Fourth Circuit, the government relies on *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), for the above-stated proposition. However, this case involves no ordinary Confrontation Clause violation. This Court has not addressed this issue – whether the Sixth Amendment can ever tolerate a trial in which *ex parte* evidence is admitted against the accused. Therefore, it constitutes an issue of first impression.

Despite the government's best efforts to reduce the importance and possible deleterious effects, simply referring to the error in this case as a generic Confrontation Clause violation, does not make it so. Indeed, as this Court has stated:

> Most of the Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements, or restrictions on the scope of cross-examination. The reason for that is not, as the State suggests, that these elements are the essence of the Clause's protection – but

> rather, quite to the contrary, that there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements . . .

Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (internal citations omitted).

Moreover, *Van Arsdall* is inapposite. As discussed in the Petition, the government and the lower court's reliance on *Van Arsdall*, 475 U.S. 673, is misplaced. In *Van Arsdall*, the Supreme Court addressed whether a Confrontation Clause violation, involving limitation on the defense attorney's cross-examination of a government witness, was *per se* reversible error. *Van Arsdall*, 475 U.S. at 678. Here, Mr. Abu Ali was denied the right to see evidence admitted against him at trial – a far more egregious breach of his Confrontation Clause rights than mere limitation of cross-examination. Moreover, *Van Arsdall* involved a matter the federal rules (and common law) place firmly within the District Court's discretion – the scope and extent of cross-examination. *See* Fed.R.Evid., Rule 611(a) and (b). Conversely, here, as the Fourth Circuit recognized in finding the Sixth Amendment violation, the trial court does not possess discretion to deny a defendant the right to examine the evidence admitted against him at trial.

In addition, even construing *Van Arsdall* as broadly as possible, the holding says at most, that *some* Confrontation Clause violations are not *per se* reversible. It certainly cannot stand for the

proposition that *no* Confrontation Clause violation can ever be *per se* reversible. The dramatically different facts of this case and context of the error distinguish it from *Van Arsdall* entirely. Here, the District Court allowed the government to introduce in evidence two classified unredacted documents that were *never* shown in their entirety to Mr. Abu Ali or his primary trial counsel.

The question of whether a Confrontation Clause violation involving "hid[ing] evidence from the defendant, but giv[ing] it to the jury" is subject to harmless-error review is an issue of first impression. *United States v. Abu Ali*, 528 F.3d 210, 255 (4th Cir. 2008). None of the other cases that the government cites are even remotely factually similar to this case, and are therefore distinguishable.

The government resorts to *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny to contend that *all* Confrontation Clause violations are subject to harmless-error review. GB at 13-14. The government's reliance on these cases is misplaced. *Lee v. Illinois*, 476 U.S. 530 (1986), *Harrington v. California*, 395 U.S. 250 (1969), and *Lilly v. Virginia*, 527 U.S. 116 (1999), all merely confirm that a *Bruton* violation is subject to harmless-error analysis. This case does not involve a *Bruton* violation, and therefore these cases are irrelevant. This case involves the admission of *ex parte* evidence against the accused, a strikingly different scenario than the improper admission of a co-defendant's statement.

The government also attempts to rely on *Coy*, 487 U.S. 1012, in an effort to claim that *all* Confrontation Clause violations are subject to harmless-error review. However, *Coy* is so factually dissimilar from the matter at issue that the holding is not applicable or binding on this case. *Coy* involved the question of whether it was constitutionally permissive to place a screen – that the defendant could see through, but that shielded the minor victims in a sexual assault case – in the courtroom during the testimony of the victims. *Coy*, 464 U.S. at 1014-15. In that limited factual scenario this Court held that harmless-error analysis applied. *Id.*, at 1021.

This reduction in the defendant's view of the witness did not reduce his ability to assist in the cross-examination of the witnesses and it did not affect his ability to confront the evidence against him. Here, in stark and dispositive contrast, Mr. Abu Ali was not permitted *at all* to see the two documents in evidence that were submitted to the jury. This fundamental violation of his Confrontation Clause rights impugns the integrity of the entire proceeding and is therefore a structural error subject to *per se* reversal. *Chapman*, 386 U.S. at 23.

Similarly, *Rushen v. Spain*, 464 U.S. 114 (1983), is factually distinguishable and therefore inapplicable and not binding. In *Rushen* this Court addressed the question of whether an *ex parte* communication between a judge and a juror was *per se* reversible. *Rushen*, 464 U.S. at 117. This Court held that this type of error was subject to harmless-error analysis. *Id.* This factual scenario is inapplicable here. Again

Mr. Abu Ali was convicted, at least in part, based on evidence that he has never seen. These facts are not comparable to an *ex parte* communication between a judge and a juror.

Thus, contrary to the government's contention that this Court has "squarely" decided this issue, the question of whether or not a trial in which *ex parte* evidence has been admitted against the defendant can ever be a "harmless" violation of the Sixth Amendment is an issue of first impression for this Court.

The government also devotes considerable space to asserting that Mr. Abu Ali failed adequately to articulate prejudice from the Sixth Amendment error. GB at 17-19. However, that begs the question: how is a defendant supposed to define the prejudice that results from the admission in evidence of information *he is not permitted to review*? The inability of Mr. Abu Ali's trial counsel to allege specific prejudice is an inescapable function of the very Sixth Amendment violation at issue, and cannot be attributed to a lack of prejudice in fact.

If the personal right to confrontation embodied in the Sixth Amendment is to have any meaning, denying a defendant and his primary trial counsel – who has crafted the defense strategy and implements it before the jury – access to evidence presented to the jury cannot ever suffice. Consequently, the government's attempt to distinguish *Gonzalez-Lopez*, in which this Court found structural error because it would be difficult in determining the prejudice

resulting from the denial of counsel of choice, GB at 16, is unavailing. Indeed, the inability to determine prejudice in *Gonzalez-Lopez* is replicated here, as should the result.

The government's related refrain that only unimportant elements of the two documents were redacted from the versions provided Mr. Abu Ali and his primary trial counsel is irreconcilable with the perceived necessity to include those portions in the versions submitted to the jury. If they were not important to the government's case, they could easily have been redacted (since they were classified) in their admitted form.

The government's conduct in fact suggests the opposite: the government's conscious and deliberate choice to expose *classified information* to jurors who did not possess even the most rudimentary security clearance demonstrates most powerfully that the information to which Mr. Abu Ali was denied access was crucial to the government's case.

Accordingly, it is respectfully submitted that this Court should grant *certiorari* in order to answer this fundamental question at the core of the Sixth Amendment's Confrontation Clause, and to address this issue of first impression.

CONCLUSION

For all the reasons set forth above, and for all of the reasons stated in the Petition, it is respectfully submitted that the Petition for Writ of *Certiorari* should be granted.

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